



SECTIONS 3 AND 4 OF THE COMPETITION ACT, 2002 COME INTO FORCE

The Parliament of India enacted the Competition Act, 2002, (the “Act”) to prevent anti-competitive practices which cause an appreciable adverse effect on competition in India. The Act basically regulates three types of situations, namely:

- Anti-Competitive Agreements (Section 3);
- Abuse of Dominant Position (Section 4) and
- Combinations (Sections 5 and 6).

The Act is being brought into force in a phased manner. The Government of India pursuant to its notification(s) dated 15th May 2009 has brought into force Sections 3 and 4 of the Competition Act. The Competition Commission of India (the “CCI”) will be operational from May 20, 2009. The Monopolies & Restrictive Trade Practices Commission (“MRTPC”) will continue to deal with any pending cases for a period of two years, before being dissolved. It will not however admit any new cases from May 20, 2009.

While Section 3 and 4 are now in force, Sections 5 and 6 dealing with combinations, mergers and acquisitions are yet to be notified and brought into force. Set out below is a brief description of these provisions of the Act:

1. SECTION 3 - ANTI-COMPETITIVE AGREEMENTS

- Section 3 provides that an agreement which restricts the production, supply, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India such as creation of barriers to new entrants; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market etc.¹ would be prohibited. Anti-competitive agreements are classified into Vertical and Horizontal Agreements.
- Vertical Agreements: Vertical Agreements are agreements between firms at different levels of the manufacturing or distribution processes. For example, an agreement between the manufacturer and a distributor is a vertical agreement. Defined by Section 3(4) of the Act, vertical agreements include tying arrangements; exclusive supply agreements; exclusive distribution agreements; refusals to deal; and resale price maintenance etc.
- Horizontal agreements: Horizontal agreements are agreements among competing enterprises, i.e. enterprises which operate at the same stage of production of goods or

¹ Section 19(3) of the Act lists certain factors that are to be taken into consideration for determining whether an agreement or a practice has an *appreciable adverse effect* on competition



provision of services, on prices or other important aspects of their competitive interaction. Cartels, for instance, are a form of horizontal agreement between producers of goods or providers of services for price-fixing or sharing of market.

- The Act treats horizontal agreements much more harshly than vertical agreements. There is a *presumption* in the Act that such agreements which directly or indirectly determine purchase or sales prices; limit or control production, supply, markets, technical development, investment or the provision of services; share the market or source of production or provision of services by way of allocation of the geographical area of the market, type of goods or services, or number of customers in the market or any other similar way; and directly or indirectly result in bid rigging or collusive bidding, cause appreciable adverse effects on competition in India. In other words, they are *per se* illegal and the burden of proof will be on the defendant to prove that the agreement in question is not causing an appreciable adverse effect on competition.
- The presumptive rule is not applicable to vertical agreements which are subject to the *rule of reason* analysis i.e. the positive as well as the negative impact of such agreements on competition will have to be taken into account before coming to any conclusion. This also applies to agreements entered into by way of joint ventures that increase efficiency in production, supply, distribution, storage etc.
- It is to be noted that Section 3(5) recognizes and protects intellectual property rights, permitting imposition of reasonable restrictions by their owners. Also agreements relating to exports to the extent to which they relate exclusively to the production, supply, distribution or control of goods or services are exempted.

1.1 SANCTIONS UNDER THE ACT

- The CCI can order any enterprise or person to discontinue with an anti-competitive agreement, which is also known as ‘cease and desist’ order.
- The CCI can also impose penalty not exceeding 10% of the average turnover for the last three financial years. In case of cartels, this penalty can be as high as three times of the profit or 10 per cent of the turnover for each year of cartelization.
- The Act also empowers the CCI to modify any agreement or direct an enterprise to abide by its orders. Contravention of CCI’s orders can invite further penalties and the CCI can even file a criminal complaint against such contravention, which in turn may then lead to imposition of additional fine or even imprisonment up to three years by the competent court.



- The CCI under Section 46 of the Act has the power to impose lesser penalty on cartels in case a full, true and vital disclosure in respect of the alleged violations has been made by participants of such cartels. It is to be noted that the CCI has framed draft regulations regarding imposition of lesser penalty and invited comments on the same in April 2009. We expect the CCI to finalize the regulations shortly.

2. SECTION 4- ABUSE OF DOMINANT POSITION

- Section 4 of the Act prohibits all enterprises from abusing their dominant position.
- A dominant position is the position of strength enjoyed by an enterprise in the relevant market which enables it to operate independently of competitive forces prevailing in the market or affects its competitors or consumers or the relevant market in its favor.
- An enterprise is considered as abusing its dominance when there is an appreciable adverse effect on competition due to the actions of such dominant undertaking for example by the imposition of unfair or discriminatory conditions in purchase or sale of goods or services or in the price in purchase or sale of goods or services, leveraging its position on the dominant market to protect its position on the other market, imposing tying and bundling obligations, indulging in predatory pricing tactics etc.

2.1. SANCTIONS UNDER THE ACT

- The CCI is empowered to impose all such sanctions that can be imposed in case of anti-competitive agreements as discussed earlier. However, in case of abuse of dominance the penalty cannot exceed 10% of the infringing dominant enterprise's average turnover for the preceding three years.
- The CCI is also empowered to order division of an enterprise which enjoys dominant position in order to prevent abuse of such position

3. SECTION 5 AND 6 - COMBINATIONS

- Section 5 of the Act defines combinations as including acquisitions, mergers, joint ventures, takeovers and amalgamations, which are regulated pursuant to the provisions of Section 6 of the Act.
- The Act prohibits a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.



- Combinations can be classified into horizontal, vertical and conglomerate combinations. While, horizontal combinations which are usually between rivals are most likely to cause appreciable adverse effect on competition, vertical combinations which are between enterprises in unrelated businesses, usually do not raise competition concerns
- It is to be noted that the operation of the Act is not confined to transactions strictly within the boundaries of India but also covers such transactions involving entities existing and/or established overseas so long as there is an appreciable adverse effect on competition in India. This is known as the “effects doctrine” and by application of this doctrine the Act has been given extraterritorial jurisdiction.
- Also, Section 6 requires that an undertaking that proposes to enter into a combination has to mandatorily give a notice to CCI. Prior to the Competition (Amendment) Act, 2007, which is yet to be notified, such pre-notification of combinations was voluntary for the parties concerned.
- It is reiterated that provisions regulating combinations have not been notified yet.

4. POWERS AND FUNCTIONS OF THE CCI UNDER THE ACT:

- The CCI is empowered by the Act to inquire into any alleged contravention of the provision either on *suo moto* basis or on receipt of information by any person, consumer or association or on a reference made to it by the Central or State Government.²
- The CCI can order the production of documents, summon witnesses and can even order search and seizure at the premises of the enterprises or individuals.
- The CCI has the power to grant interim relief³, impose penalty⁴ and to grant any other appropriate relief. The CCI also has the power to levy penalty for contravention of its orders, making of false statements or omission to furnish material information, etc.

5. CONSTITUTION OF CCI

- In exercise of the power conferred upon it, the Central Government has established the CCI, with effect from October 14, 2003, which has its head office at New Delhi.
- The CCI at present consists of five members, including the chairman, Mr. Dhanendra Kumar, former executive director of the World Bank. The other members are Ms. Geeta Gauri, ex-director (tariffs), Andhra Pradesh Electricity Regulatory Commission; Mr. P N Parashar former judicial member of the Income Tax Appellate Tribunal; Mr. HC Gupta,

² Section 19, Competition Act, 2002.

³ Section 33, Competition Act, 2002.

⁴ Section 27(b), Competition Act, 2002.



former coal secretary and Mr. R Prasad, former chairman of the Central Board of Direct Taxes.

- Appeals against the orders of the CCI will lie before the Competition Appellate Tribunal (“CAT”) which is to consist of three members with Justice Arijit Pasayat, the retired judge of the Supreme Court, occupying the post of Chairman. Mr. Rahul Sarin, Ex-secretary, Personnel and Mr. Praveen Tripathi, former Deputy Comptroller & Auditor General are the other two members.

CONTACT US

We would be happy to provide you with further information or talk through these provisions with your teams, should you require any assistance. Please feel free to contact our team:

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